Kimberly Hunter-Turner
Vice President
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CENDANT

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Office of the Secretary
Marlene H. Dortch
Room TW-A325
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Telemarketing Rulemaking – Comment
FCC Docket No. 02-~~250~~ 278
92-90

Dear Madam Secretary:

Enclosed are four copies of comments submitted **by** Cendant Corporation in the above referenced rulemaking. Thank you for your consideration of our views.

Sincerely,

Kimberly A. Hunter-Turner

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HAND DELIVERED

November 22,2002

Before the
Federal Communications Commission

Telemarketing Rulemaking – Comment

FCC Docket No. ~~02-250~~

Comments of

Cendant Corporation

Cendant Corporation ("Cendant") appreciates the opportunity to submit these comments on the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, as the Commission considers proposed amendments to that Rule.

CENDANT OVERVIEW

Cendant Corporation is a diversified global provider of business and consumer services within the hospitality, real estate, vehicle, financial and travel sectors.

Cendant's hospitality division is the world's leading franchisor of hotels through ownership of brand names that include Ramada®, Days Inn®, Howard Johnson@, Travelodge®, Knights Inn®, Super 8 Motel®, Wingate Inn®, Villager Lodge/Premier® and AmeriHost®, a leading operator of branded time share resorts (Fairfield®) and the world's leading time share exchange service (RCI®).

Cendant is also the leader in franchised residential real estate brokerage operations through its CENTURY 21®, Coldwell Banker@ and ERA® brands, a leading residential mortgage company (Cendant Mortgage) and provider of employee relocation services (Cendant Mobility).

In vehicle services, Cendant owns AVIS®, the nation's second largest car rental system. Other Cendant subsidiaries provide vehicle fleet management services (PHH Arval and Wright Express).

The financial services division helps financial institutions enhance existing consumer products. This division also includes Jackson-Hewitt, Inc., the second largest tax preparation franchisor.

Cendant provides services to the travel industry through its Galileo®, Wizcom reservations and global travel ticket distribution services as well as its on-line (Trip.com and Cheaptickets.com) and off-line (Cendant and Cheap Tickets) travel agencies.

As a general matter, Cendant supports the changes to the Telemarketing Sales Rule that the Commission is proposing. Cendant emphasizes that the proposed changes will have a significant impact on the costs of businesses that rely upon telephonic communications in order to provide consumers with the goods and services that they desire. Cendant offers the following specific comments for consideration by the Commission.

I. NATIONAL DO-NOT-CALL LIST

a. There Needs To Be a Single Do-Not-Call List

Cendant supports the creation of a national do-not-call list as a step forward for consumers, some of whom do not wish to receive telemarketing calls at home, and for businesses that do not want to incur the expense of calling consumers who do not wish to receive calls. Numerous states have enacted their own do-not-call list requirements. While not citing the total number of consumers who have chosen to add their names to state do-not-call lists, the Federal Trade Commission in their earlier Notice of Proposed Rulemaking (FTC Telemarketing Rulemaking File No. R411001, April19, 2002) notes that four million consumers have signed up for the Direct Marketing Association's Telephone Preference Service and suggests that the number of consumers signing up for state do-not-call lists is growing dramatically. If the FTC proposal takes effect, companies will he faced with having ***to*** develop compliance mechanisms for the FTC list as well as the list of every state into which they call. For companies, like Cendant, that operate nationally, this alone could create significant compliance burdens. We are concerned about the potential for differing definitions and standards between federal and state lists and even the potential for conflicting requirements.

A multitude of lists will also complicate the situation from the consumers' perspective. Consumers will he unsure whether, having signed up for the FTC list, they also need to sign up for the list in the state in which they live. Some of the effectiveness of a national do-not-call list will he lost if multiple, parallel systems continue to operate.

We encourage the FCC to take steps to minimize the burden of complying with numerous, potentially conflicting obligations. Along these lines, we urge the FCC to incorporate names already found on any existing state lists established by state legislation/regulation into the FTC list this is similar to what the FTC is now proposing. This would, in effect, incorporate all the state lists into a national list. It would significantly improve the ability of merchants desiring to comply. We also recommend that the FCC report to Congress that preemption of state **laws** would actually make it

simpler and easier for consumers to exercise their preferences and for businesses to respect those choices. While preemption of only weaker state laws may be appealing to some, it would not address the compliance burden. The greatest prospect for success of the system proposed by the FCC is to create one clear set of standards for everyone to follow.

b. Company-Specific Do-Not-Call Lists

Cendant also supports the retention of the company-specific do-not-call lists. In the 1992 TCPA Order the conclusions that the FCC reached were correct. Company specific do-not-call-lists have and continue to have many advantages for the both the consumer and businesses. The benefits are as follows: (1) they are already maintained by many telemarketers; (2) allow residential subscribers to selectively halt calls from telemarketers; *(3)* allow businesses to gain useful information about consumer preferences; **(4)** protect consumer confidentiality because the lists are not universally accessible; and *(5)* impose the costs of protecting consumers on telemarketers rather than telephone companies or consumers. Cendant would prefer the continuance of company specific lists over state sponsored lists. However, a single national do-not-call-list would be a more effective tool in providing consumers the ability to put themselves on one list and receive no telemarketing calls while lessening the administrative burden for businesses.

II. RESTRICTIONS ON PREDICTIVE DIALERS ARE PREMATURE

Predictive dialers are tools used by many telemarketing organizations to improve operating efficiencies. As in virtually every business, efficiency reduces costs that, in turn, reduces prices charged to consumers. Although telemarketing organizations have great incentive to minimize "dead air" calls as much as possible, it is difficult when using a predictive dialer to ensure that they never occur at all. While recognizing that "dead air" calls are an irritant to consumers, Cendant believes that the proposed national do-not-call list and other proposals to prevent telemarketers from disabling consumers' "caller ID" equipment provide consumers with additional powerful tools to properly respond to telemarketers with a high incidence of such calls. A consumer who does not want to receive calls can simply put his or her name on the national list or contact the telemarketer that made the "dead air" call. These new consumer tools should be given an opportunity to have an impact on the scope of the "dead air" call issue before requiring a threshold on the number **of** abandoned calls. However, in an ongoing effort to minimize harm that results from the use of predictive dialers, Cendant believes that a 5% error rate on the number of abandon calls is technically feasible for a company to monitor and correct.

III. CALLS WITH EXISTING CUSTOMERS SHOULD BE EXEMPT FROM THE DO NOT CALL LIST

Many companies frequently use the telephone to advise their existing customers of information that is desired by the customer. A local merchant may have a practice of routinely calling a list of customers to alert them of a pending sale of merchandise that the merchant knows would be of interest to the customer. During recent months, many mortgage lenders called customers with high rate mortgages to inform them of the opportunity to refinance their existing home mortgage. In the two common examples, both the business and the consumer are benefited. It is the relationship between the parties that provides the knowledge for the business entity to know its customers' needs and buying practices. This relationship, coupled with the ability to directly contact the customer to inform him of the opportunity, creates a valued service to the customer while helping the business to retain a satisfied customer. Without the ability to contact the customer the value of the relationship is lost. The proposed rule needs to provide an exemption to permit direct contact with existing customers to continue.

Our concern is that once a consumer's name and telephone number are placed on the do not call list, the only way the consumer can receive telephone calls is by providing "express verifiable authorization" on a company-by-company basis. Cendant believes that consumers will not understand that by placing their name on the national do not call list, they arc stopping not only "cold" calls from unfamiliar merchants, but calls from companies that they have done business with in the past. Should a consumer change his mind and no longer desire to receive calls from a particular company, the existing rule has an established procedure for this purpose. Thus for the Commission to provide an exemption for calls by companies to existing customers does not, in any way, curtail the valuable protections afforded consumers under the rule.

Cendant urges the Commission to recognize that many calls by businesses to existing customers are a significant part of the service that the customer expects and has actually requested from the business. In many cases, the customer has agreed, in writing, that it recognizes that it will receive such calls.

One of Ccndant's companies, Resorts Condominium International, L.L.C., is the leading provider of time-share exchange services. In its written agreements with its customers/members (existing owners of time shares who desire exchange services), the customer acknowledges, in writing, that one of the services that RCI provides is to notify the customer/member of the availability of time share-related opportunities. Often these opportunities are time sensitive and involve the ability to obtain accommodations that have recently been made available at a time share resort at below-market rates.

Cendant urges the Commission to clarify that when a customer has a written agreement with a business that contains a provision whereby the customer has authorized the business to contact them hy telephone to inform them of products and services that the business is not subject to the proposed rule. The rights of the consumer continue to be

protected since he or she can contact the business directly to terminate the calls under the existing rules.

Cendant commends the coordination between the FTC and the FCC concerning amendments to the Telemarketing Sales ***Rule,*** *16 C.F.R. Part 310, and the Telephone Consumer Protection Act of 1991, 47 C.F.R. Part 64.* ***In*** *order to reconcile any potential inconsistencies, below we have highlighted our comments from the FTC proposal that were not addressed in the FCC proposal.*

IV. Calls Initiated By Consumers Should Not Be Subject To "Outbound" Rules

One of Cendant' primary concerns with the proposed rule is that it will dramatically expand the definition of "outbound" calls to include those that result from "upselling" or cross marketing that occurs during a consumer initiated "inbound" call.

Having converted an in-bound call to an outbound call, in response to a consumer accepting an offer to hear more about a related product **or** service, **e.g.**, the proposed rule does not address how other provisions of the rule might apply in this situation. In fact, upon examination, many of the other provisions of the rule would be inapplicable or burdensome to apply. For instance, the rule prohibits outbound calls to consumers other than between 8:00 a.m. and 9:00 p.m. (based on the time zone in which the consumer is located). If a consumer places an inbound call to order a product or service, is the telemarketer prohibited from offering that consumer additional products or services of interest if the consumer's name is on an applicable do-not-call list and happened to have placed the call after 9:00 p.m.? Technically, this beneficial activity would violate the FTC Rule as proposed. The call center would need to determine the caller's location, which is not otherwise necessary, then determine the local time at call origin, then decide whether to offer the caller additional goods or services. To the extent the rule was designed to prevent consumers from being disturbed at home early in the morning or late at night, that logic would not apply to calls initiated by the consumer at a time selected by, and, therefore, assumed to be, convenient for the consumer. The caller need only decline the offer or hang up to avoid the proposal.

There is also a considerable question about the application of the do-not-call list to such calls. First, as a technical matter, telemarketers may not always know the telephone number of the inbound **caller.** Many consumers choose to block their number from being read by Caller ID devices. How then would the telemarketer know, during the call initiated by the consumer, that the consumer's name appeared on an applicable do-not-call list? Also, it does not necessarily follow that a consumer who does not wish to receive telemarketing calls at home has any interest in not receiving information about goods or services of interest once they have chosen to initiate a call to a telemarketer

Finally, the operation of this provision would be inconsistent with the services provided by many firms that consumers find highly beneficial. For example, as a major player in the U.S. travel industry, consumers often reach one of Cendant's hotel companies by calling a toll free number for hotel reservations. The Cendant employee helps them make reservations at Cendant-franchised hotels (such as Days Inn or Travelodge). It is quite common for the employee to make the consumer aware of other related goods or services provided by another Cendant company or a business partner. For example, a consumer making a hotel reservation will often find it helpful if the Cendant employee can assist them to reserve a rental car or transfer them to someone who can make such arrangements. Such transactions as this happen countless times a day with no apparent problems or complaints. It is noted that identical activities occur in the non-telephone marketplace as a normal occurrence, such as when one purchases an apparel item and the salesperson asks if the consumer would like assistance in selecting coordinated accessories. Such activity is at the very heart of any service business. The Commission does not cite any factual basis to support the notion that such activities have caused significant consumer harm nor that such activities should be curtailed in the way suggested in the proposed rule.

Cendant suggests that a business receiving a call ought to be able to ask the consumer who initiated the call if he or she desires to learn about other goods or services and, if the consumer says "NO", promptly end the call. If the consumer says "YES", the sales promotion with any required disclosures should continue, even in the event that it requires an outbound call to transfer the consumer to another party because the consumer has chosen to hear the offer. **A** telemarketer whose up-sell/cross sell techniques are objectionable will soon absorb the wrath of consumers in a decline of inbound calls for the primary good or service offered. Market forces will cause telemarketers to avoid consumer alienation reactions to this activity more effectively then regulations.

The Commission should seriously consider deleting the expanded definition of outbound telephone calls. Cendant does not believe that the benefits such an expanded definition provides, if any, are worth the considerable cost of subjecting huge numbers of certain types of transactions to the Telemarketing Sales Rule when there has been no evidence of significant problems with those types of transactions.

V. ELECTRONIC SIGNATURES ARE *AN* ACCEPTABLE MEANS FOR CONSUMERS TO OPT IN

The proposed FTC Rule permits consumers to provide "express verifiable authorization" if they wish to receive calls from specific entities even if they have added their name to the general do-not-call list. Essentially, this permits a limited opt-in to the receipt of calls despite the broader opt-out the consumer has exercised. Cendant supports consumers' ability to fine tune their preferences and not be forced to block all calls when there may bc a subset of calls they would find beneficial. The proposed rule specifies two methods by which consumers may express their intention to receive calls. Section 310.4(b)(1)(iii)(B)(1)-(2). The first would permit "express *written* authorization." Under

the E-SIGN electronic signature legislation, electronic or digital signatures can now satisfy regulatory requirements for a writing. The FTC's proposed rule includes a footnote recognizing the use of electronic or digital signatures to satisfy the "express written authorization" requirement when submitting certain types of billing information. Section 310.3(a)(3)(i). The footnote provides: "For purposes of this Rule, the term 'signature' shall include a verifiable electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law." However, there is no comparable footnote to the "express written authorization" requirement relating to exceptions to the do-not-call list under Section 310.4(b)(1)(iii)(B)(1)-(2). Cendant recommends the addition of a clarifying footnote or language in the definition section that indicates electronic or digital signatures would satisfy the writing requirement for opting in to receipt of telemarketing calls. Without such clarification, there would uncertainty about whether consumers could provide their authorization through Web sites or by other electronic means.

VI. THIRD PARTIES SHOULD BE PROHIBITED FROM ADDING CONSUMERS TO THE DO-NOT-CALL LIST

In its discussion of the "do-not-call" list, the FTC raised the question whether third parties should be permitted to suhmit requests to add specified consumers to the "do-not-call" list. The Commission raised the concern that such third-party submissions may not have a sufficient level of accuracy or evidence consumer choice of available call preferences. Cendant strongly supports a prohibition on use of third parties for a number of reasons. We do not believe that anyone other than the registered "owner" of the telephone number should be able to place the number on the do-not-call list. First, as the Commission notes, use of a third party will raise serious questions about the third-party's authority to act on a consumer's behalf. This has a related risk not mentioned in the proposed rule. Permitting third parties, such as associations or other groups, to add consumers' names has the serious potential of inviting unfair competition. Most membership associations or groups also market products and services to their members. For instance, once a consumer becomes a member of the association or group, the association or group might have an incentive to add that consumer's name to the do-not-call list but specifically exclude marketing activities by the association or group to prevent that consumer from receiving competing offers in the future. It would also add to the complexity of implementing the list.

VII. ALTERNATIVES TO A BLANKET PROHIBITION ON SHARING PREACQUIRED ACCOUNT INFORMATION SHOULD BE CONSIDERED

The proposed FTC rule treats the practice of sharing preacquired billing information as being abusive. A number of opportunities for telemarketers to abuse this information arc cited, including billing unauthorized charges, deceptive free trial offers, and shifting control away from consumers in concluding a transaction. The proposed rule concludes

that the best way to address this problem is an outright prohibition on the sale or transfer of this information.

Without specific legislative authority, Cendant questions whether the Commission has the authority to completely prohibit the transfer of billing data in every circumstance. Such a prohibition is also questionable from a public policy standpoint, since the Commission did not consider other alternatives. Cendant respectfully requests that the Commission consider the following alternatives to a blanket prohibition on the transfer of billing data.

(a) Faced with many of the same concerns with regards to account number information in the context of financial institutions, Congress and the FTC took a slightly different approach to the exchange of account numbers in the Gramm-Leach-Bliley Act ("G-L-B") and its implementing regulations. In the discussion of sharing account numbers with telemarketers, Congress concluded that no account number should be shared with third party marketers (including telemarketers). The federal agencies regulating financial institutions and the FTC adopted regulations implementing this approach (16 C.F.R. 313.3(o)(2)(G)(ii)(B) and 16 C.F.R. 313.12(c)(1)). In conjunction with a prohibition on financial institutions sharing account information for all marketing purposes, GLB does permit the sharing of account numbers in an encrypted form that does not reveal the account number, so long as the recipient is not given the means of decoding the number. In adopting G-L-B in 1999 and the rules thereunder in 2000, Congress and the FTC concluded that the use of encrypted account numbers would prevent the fraudulent practices that had occurred in the past while permitting some of the efficiencies of sharing account information. The Commission should give this recent Congressional standard on the handling of a consumer's account number information deference to the Telemarketing Sales Rule which is being promulgated pursuant to legislation passed by Congress back in 1994.

Cendant suggests that the Commission follow its own precedent in the GLB context and permit "financial institutions" covered by G-L-B to share encrypted account number information with telemarketers. The definition of "financial institutions" under G-L-B is very broad. There may be many situations where a "financial institution" is in competition with a company that is not a financial institution in marketing a product or service using a telemarketing approach. In order to eliminate, or minimize competitive disparities, Cendant suggests that the Commission provide that any entity may share or receive encrypted account number information for telemarketing purposes provided that the provider of the encrypted account numbers has adopted procedures compatible with those required by the Commission of "financial institutions" under G-L-B.

(b) Consumers have legitimate concerns relating to reading a "live" account number over the telephone. In addition, such a process is fraught with many other concerns relating to the accuracy of the information being provided. It must be remembered that a credit card number consists of sixteen digits plus a four digit expiration date for a total of twenty digits that must be both read correctly by the consumer and captured correctly by the marketer. Obviously there is a great opportunity for error in this manual process.

In addition to the alternative described above with respect to regulations under G-L-B, Cendant strongly urges the Commission to permit an exchange of encrypted or coded account numbers under a process whereby the marketer agrees to record on tape the consumer's affirmative consent authorizing the marketer to obtain the consumer's billing information from the financial institution or other identified source. The specific question would he along the following lines: "Mr. Jones, do we have your approval for [name of financial institution] to provide your hilling information to [name of telemarketer] so that [name of telemarketer] can bill your account?" The above approach would avoid consumer anxiety from reciting a credit card number over the telephone and the human errors involved in such a process. This approach also provides better protection of the consumer's account number than providing it over the telephone as required under the Commission's proposal.

Cendant also seeks clarification from the Commission in the proposed rule that sharing a consumer's hilling information with the actual contemplated provider of the service is not a violation of the proposed rule. In the case of a hotel reservation, for example, the central reservation service provider (often an operation of the hotel franchisor or other independent service) requests a consumers billing information to hold the room and guarantee the first night's stay. While it is normal practice for the consumer to also provide this billing information to the hotel when registering as a guest at check-in, the hotel also requires the consumer's hilling information to obtain compensation for guests who change their plans without notice to the hotel or central reservation service provider and never cancel the reservation. These "no-show" customers have breached their contracts with the hotels, causing loss of revenue. Even if the reservation was made as the result of an "outbound" telemarketing call under the proposed rule's expansion of that term, subsequently providing the billing information to the hotel is not an act done "for use in telemarketing" since the telemarketing, if any, has already concluded.

VIII. THE BILLING AND DISPUTE RESOLUTION STANDARDS REQUIRE CLARIFICATION

The proposed FTC Rule (16 CFR 310.3(a)(3)) establishes two alternative standards of "express verifiable authorization" for the marketer prior to submitting hilling information for payment, The provision also establishes an alternative to the "express verifiable authorization" approach. Cendant believes these alternative approaches are simply not workable and impose significant obligations on marketers and will be confusing to consumers.

The first "authorization" test is **a** written authorization – not conducive to, or even consistent with, a telephone transaction. The second test requires a lengthy, detailed, verbal disclosure that is not conducive to a telephone call that is both fraught with the possibility of human errors and has a high likelihood of not being understood by the consumer.

As an option to meeting either of the two "express verifiable authorization" standards, the marketer is permitted to bill the customer if the billing method includes a limitation on the customer's liability for unauthorized charges or provides a dispute resolution procedure ***comparable*** to those available under the Fair Credit Billing Act and the Truth in Lending Act, as amended.

The proposed rule does not provide any guidance as to what is meant by the term "comparable" or who makes the determination that any particular payment and dispute resolution system meets the "comparable" standard.

There are billing dispute mechanisms in other federal regulations such as the Real Estate Settlement Procedures Act (12 USC 2605(e)) and Regulation E (12 CFR 205.11). Cendant urges the Commission to clarify that the use of these provisions, and other federal regulations, meet the standards of this section.

A second concern with the "comparable" billing dispute alternative is that there is no guidance provided as to who *makes* the decision as to whether the billing dispute mechanism is, in fact, comparable, Given the large number of entities involved in telemarketing activities, there will be a wide diversity of billing dispute mechanisms that marketers determine meet the "comparable" test. Cendant does not believe that the Commission intends such a result.

Before leaving this point, Cendant urges the Commission to include a specific statement in the proposed rules that the marketer can rely upon the statement by the customer as to the type of billing mechanism that the customer is using to pay for the goods or services. There is no ability for the marketer to know, for example, whether an account number provided by the customer is a credit or debit card. While the billing resolution procedures are similar, they are not identical. If the consumer tells the marketer that it is a credit card, the marketer should be able to rely upon that statement even if the account is a debit card. This is an important issue, particularly if the Commission determines that the billing and dispute resolution procedures for such cards do not meet the "comparable" test.

IX. CLARIFICATION THAT FRANCHISE SALES PURSUANT TO THE FTC'S FRANCHISE RULE ARE EXEMPT

Cendant's reading of section 310.6(b) of the proposed **rules** concerning the sales of franchises are that such calls are subject to the following sections of the proposed rule: a) 310.4(a)(1) (threats, intimidation etc), b) 310.4(a)(6) (blocking caller "ID" equipment), c) 310.4(b) (pattern of calls, including do not call list) and d) 310.4(c) (calling time restriction).

Franchise sales are not consumer transactions within the scope of rules that affect transactions between merchants and consumers. The purchase of a franchise is a major investment or commercial transaction between commercial parties that merits regulation, and traditionally has been subject to regulation, as a comercial and not a consumer transaction.

With respect to franchise sales generally, the commentary accompanying the proposed rule does not set forth any facts evidencing abuses of any kind with respect to franchise sales. Cendant has no objection to the proposal that such calls are subject to the restrictions of sections 310.4(a)(1) and 310.4(a)(6). Absent any evidence of abuses, there does not appear to be any basis for subjecting calls relating to franchise sales to the restrictions of the do not call list or other provisions of section 310.4(b) and the time of day restrictions under section 310.4(c).

A typical outbound telemarketing call is going to be in response to a consumer/business person who has indicated through returning a post card or by placing a call to a number listed in an advertisement that he would like to have someone call him to obtain additional information about the franchise opportunity. In many cases, the next contact by the franchisor is to make the consumer-requested call. Under these circumstances, as long as the franchisor is conducting the sale in accordance with the Commission's rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures", 16 C.F.R. Section 436,*et* ***seq.,*** (the "Franchise Rule") the restrictions set forth in sections 310.4(b) and (c) are not justified based on the record described by the Commission in its commentary accompanying the proposed rule. **As** an example, many prospective franchisees have a full time job before they start their franchise operation. Such persons may prefer to receive a call responding to their request for more information in the late evening hours when they are at home. In addition, by responding to an advertisement for additional franchise information, they have indicated that they desire to receive a call from the specific franchisor even if the consumer had placed his name on the national do not call list.

Cendant notes also that section 310.6(e) is not clear and needs to be revised to clarify, in conjunction with section 310.6(b), that telephone calls made pursuant to the Franchise Rules are exempt from the Telemarketing Sales Rules.

Thank you for considering our views.

Respectfully submitted,

Kimberly Hunter-Tumer

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